since no malice was shown, everything done by the defendant was done in the ordinary course of conducting the business; that being so, the occasion remained privileged.

B. C. J.

IS A CONVICTION ON A VOID INDICTMENT A BAR TO A SUBSEQUENT PROSECUTION?—It is an established maxim of the common law[1] incorporated into the Federal Constitution[2] and made a part of the fundamental law of every state[3] that no man shall be put in jeopardy twice for the same offense. However well established this doctrine is, it is often difficult to determine whether, on a given state of facts, former jeopardy can be pleaded as a bar to a second prosecution.

The general rule is that there can be no jeopardy where the indictment is not sufficient to sustain a conviction.[4] Such an indictment may be either void or defective. It is void where it does not state an offense,[5] or where it was found by a grand jury which was illegally organized;[6] while it is defective where it states an offense and was regularly found, yet because of errors in form or substance it is insufficient to sustain a conviction and would be reversed on error.[7] The theory upon which the above rule of jeopardy is based is that it would be a contradiction in terms to say that a person was put in danger of his life or liberty by an indictment under which he could not be convicted; for the law will presume that the court will discover the defect in the indictment in time to prevent the defendant's being convicted.[8] Thus, it is universally held that a conviction and judgment upon a defective or void indictment is not a bar to another prosecution for

[1]4 Blackstone's Commentaries, 335; Kohlheimer v. State, 39 Miss. 548, 77 Am. Dec. 689 (1860), *semble*.

[2]Constitution of the U. S., Amend. V: "Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb."

[3]Alabama, Const. of 1901, Art. I, sec. 10; California, Const. of 1879, Art. I, sec. 13; Colorado, Const. of 1876, Art. II, sec. 18; Delaware, Const. of 1897; Indiana, Const. of 1851, Art. I, sec. 14; Kentucky, Const. of 1890; Maine, Const. of 1819; Ohio, Const. of 1851, Art. I, sec. 10; Pennsylvania, Const. of 1873, Art. I, sec. 10.

[4]Kohlheimer v. State, *supra;* Robinson v. State, 52 Ala. 587 (1875); State v. Smith, 88 Iowa, 178 (1893); People v. Terrill, 133 Cal. 120, 65 Pac. 303 (1910); Kenny v. State, 121 Md. 120, 87 Atl. 1109 (1913), *semble;* Bishop: New Criminal Law, 8th ed., Sec. 1021, par. 2.

[5]State v. Bogard, 25 Ind. App. 123, 57 N. E. 722, 81 A. S. R. 84 (1900); People v. Terrill, *supra*.

[6]Kohlheimer v. State, *supra;* Finley v. State, 61 Ala. 201 (1878); U. S. v. Jones, 31 Fed. 725 (1887); Ogle v. State, 43 Tex. Cr. App. 219 (1901); Stephens v. State, 50 So. 42 (Ala. 1909).

[7]Commonwealth v. Phillips, 16 Pick. 211 (Mass. 1834); Shook v. State, 25 Tex. Cr. App. 345 (1888); U. S. v. Ball, 163 U. S. 662 (1895); State v. Keating, 202 Mo. 197 (1907).

[8]Hawkins, Pleas of the Crown, vol. II, ch. 35, sec. 8; 4 Criminal Law Magazine, 487, 490; People v. McNealy, 17 Cal. 332, (1861) *semble*.

the same offense where the judgment has been reversed.[9] And the same rule is followed where the indictment is void and the judgment remains unreversed.[10]

However, it is held that if judgment is rendered upon a verdict of guilty found upon a defective indictment, the defendant cannot be prosecuted again for the same offense while the judgment remains unreversed.[11] Mr. Bishop expresses the basis of these decisions as follows: "After a verdict of guilty on such an indictment (i. e. defective), and judgment is rendered thereon, there can be no second prosecution while the judgment is unreversed,—not because there has been a jeopardy, for there has not, but because the judgment is voidable only, and of the same effect while it stands as a valid one."[12] What then is the effect of a valid judgment? In civil actions such a judgment is a bar to a second action on the doctrine of *res judicata*. But apparently this doctrine is not applicable to criminal cases. It would seem that the corresponding doctrine in criminal prosecutions is that of double jeopardy. Wells in his book on Res Ajudicata and Stare Decisis says: "The principle (i. e. in criminal cases)—which is parallel to the principle prevalent as the fundamental rule in civil cases—is, that no one shall be twice put in jeopardy for the same offense."[13] Thus where there is no jeopardy, there is nothing to prevent another prosecution and the above decisions which hold an unreversed voidable judgment a bar would seem to be erroneous.

A more difficult application of the doctrine arises where the defendant has been convicted on a defective indictment in a court of competent jurisdiction and has suffered the full punishment prescribed by law. In such a case it is held that he cannot be prosecuted the second time for the same offense; and this is true, although the judgment on which the sentence was rendered was so defective that it would have been reversed on error.[14] In Commonwealth v. Loud,[15] the leading authority on this subject, the defendant stole some lumber and was arraigned before a justice

[9]People v. Casborous, 13 Johns. 351 (N. Y. 1816); U. S. v. Jones, *supra;* State v. Lee, 114 N. C. 844, 19 S. E. 375 (1894); U. S. v. Ball, *supra;* State v. Foley, 114 La. 412, 38 So. 402 (1905); State v. Keating, 223 Mo. 86, 122 S. W. 669 (1909); Murphy v. Massachusetts, 177 U. S. 155 (1910); State v. Washington, 84 Wash. 113, 146 Pac. 378 (1915).

[10]Davidson v. State, 99 Ind. 366 (1884); State v. Bogard, *supra*; Ogle v. State, *supra;* Kohlheimer v. State, *supra, (semble)*.

[11]Fritz v. State, 40 Ind. 18 (1872); Ford v. State, 7 Ind. App. 567, 35 N. E. 34 (1893); Bishop: New Criminal Law, 8th ed., sec. 1021, par. 3; 2 Hale P. C. 248.

[12]Bishop: New Criminal Law, 8th ed., sec. 1021, par. 3.

[13]Wells: Res Adjudicata and Stare Decisis, p. 318.

[14]Commonwealth v. Loud, 3 Metc. 328, 37 Am. Dec. 139 (Mass. 1841); State v. George, 53 Ind. 434 (1876); Davis v. State, 37 Tex. Cr. Rep. 359, 39 S. W. 937 (1897); Ford v. State, 7 Ind. App. 567, 35 N. E. 34 (1893), *semble;* Cherry v. State, 103 Miss. 225, 60 So. 138 (1912), *semble;* 2 Ben. and H. Lead. Cases 554.

[15]3 Metc. 328 (Mass. 1841).

of the peace on a defective complaint for larceny. He was convicted and fined, which fine and costs he paid. Later he was tried in the common pleas for the same offense. He then proposed to prove a prior conviction of the same offense as a bar to that indictment and offered, for that purpose, a record of the prior proceedings before the justice of the peace. The court held this a good defense, Putnam, J. saying: "The judgment that the defendant was guilty, although upon proceedings which were erroneous, is good until the same be reversed. It was the right and privilege of the defendant to bring a writ of error, and reverse that judgment; but he might well waive the error and submit to and perform judgment and sentence, without danger of being subjected to another conviction and punishment for the same offense." Apparently there has been no legal jeopardy because the indictment was defective and had the defendant moved in arrest of judgment the conviction would have been reversed. But the courts seem to proceed on the ground that the defendant, by acquiescing in the judgment and sentence, has waived all errors in the indictment, thereby giving it the effect of a valid one. Since, therefore, the indictment had the effect of a valid one, jeopardy attached and he could not be prosecuted again for the same offense. This reasoning would seem to be correct. Other courts have reached the same conclusion by proceeding on the ground that by serving his sentence the defendant has paid his debt to the state and cannot be made to pay again.[16] These decisions, however, cannot be reconciled with the doctrine of jeopardy since the indictment was not sufficient to sustain conviction.

The real difficulty arises where the indictment instead of being merely defective is void and the defendant undergoes sentence. In such a case it would seem that if the sentence has been executed, the accused could not be prosecuted the second time.[17] With the exception of the recent case of State v. Collins, decided by the Supreme Court of Washington,[18] no decision has been found directly in point. But the dicta are so strong that they cannot be ignored. In Kohlheimer v. State,[19] Harris, J. said: "It seems to be clear, therefore, upon principle as well as authority, that neither at common law nor by our constitution, will an acquittal or conviction, *where the penalty has not been inflicted*, upon a void proceeding or indictment, operate as a bar to a subsequent indictment for the same offense." The only inference that can

[16]Davis v. State, *supra;* State v. Snyder, 98 Mo. 555, 12 S. W. 369 (1889), *semble;* Ford v. State, *supra* (*semble*), Cherry v. State, *supra* (*semble*).

[17]Bishop, New Criminal Law, 8th ed., sec. 1023: "After the erroneously convicted person has suffered the full punishment of the law, another principle, yet probably not our constitutional guaranty, intervenes to prevent a second prosecution. It would resemble a civil suit to recover a debt already paid, and the punishment paid is no more due a second time than a civil debt."

[18]191 Pac. 831 (Wash. 1920).

[19]39 Miss 548, 77 Am. Dec. 689 (1860).

be drawn is that if the penalty has been inflicted and undergone on a void indictment, it would bar a second indictment. Other dicta proceed on the ground that the defendant has satisfied the demands of the law and cannot therefore be again tried for the same offense.[20] This expression of the law cannot be reconciled with the doctrine of double jeopardy. As we have seen above, if the indictment is void, jeopardy does not attach. Nor can it be argued that the defendant by serving his sentence waives the errors. "The defendant may waive erroneous or voidable proceedings but it is neither in the power of the defendant, nor of the court, nor even of the Legislature itself, to give validity to a void prosecution, or a void judgment upon a void indictment."[21] The defendant, therefore, was not in legal jeopardy. If he underwent the sentence he was doing voluntarily what he was not legally compelled to do, for he was at perfect liberty to assert his freedom by force. Although in fact he was in jeopardy, legally he was not; and for this reason he could not interpose a plea of *autrefois convict.* The only ground upon which the serving of sentence on a void indictment can be pleaded as a bar to a second prosecution is that of fairness and justice.

It would seem that in such a situation as this, the defendant should be protected so that he could not be compelled to serve a second sentence for the same offense. The doctrine of double jeopardy, however, does not give him this protection. The reason that it fails in such a case is because the rule which requires that the indictment be valid before there can be jeopardy is founded on the assumption that the courts are infallible. The legal presumption is that the court will discover the defect in the indictment in time so that the defendant will not be convicted[22] and therefore the doctrine does not consider a case where the defect has not been discovered and the defendant has suffered the penalty. A better example of this situation cannot be found than the recent case of State v. Collins mentioned above.[23]

In that case Collins was arraigned before a justice of the peace on a complaint charging him with having "struck George Vath with his hand." He was convicted and fined and upon the payment of the fine was discharged. Later an indictment charging an assault was filed against him for the same offense. To this indictment he interposed a plea of former conviction by offering a record of the prior proceedings before the justice of the peace. This evidence was rejected and on error the Supreme Court held the ruling of the lower court correct. This case turned on the fact that the first complaint was insufficient to state an offense, Fullerton, J. saying: "In the absence of a statute to the contrary, there

[20]Ford v. State, *supra* (*semble*); Cherry v. State, *supra*, (*semble*); Bishop, New Criminal Law, 8th ed., sec. 1023.

[21]Per Harris, J., in Kohlheimer v. State, *supra.*

[22]Note 8, *supra.*

[23]191 Pac. 831 (Wash. 1920).

can be no lawful conviction or acquittal upon an information, indictment or complaint which is insufficient to state an offense, and hence no plea of former jeopardy thereon." The court in its opinion laid no stress on the fact that the defendant had already suffered the penalty but placed the decision entirely on the ground that the indictment was void. Thus the decision would be the same whether punishment had been suffered or not. Applying strictly the doctrine which requires a valid indictment before former jeopardy can be pleaded, the decision is correct. Since the indictment did not state an offense known to the law, it was void[24] and thus legal jeopardy did not attach. The fact that the defendant suffered the penalty did not change the situation, since, unlike the cases where the indictment is merely defective, it was not within his power to waive void proceedings and a void judgment. Therefore there was nothing to bar another prosecution for the same offense. But in view of the dicta above mentioned and on principles of fairness and justice the decision is in error. The defendant has paid the debt which the law demands for his crime and he should not be compelled to pay it a second time for the same reason that a civil court should not compel a debtor to pay his creditor twice for the same debt. To hold otherwise would be to place in the hands of the state a dangerous instrument of persecution contrary to the reason upon which the rule of double jeopardy is founded, i, e., *Nemo debet bis puniri pro uno delicto.*[25]

F. H. K., Jr.

[24]Note 5, *supra.*
[25]Broom, Legal Maxims, 8th ed., p. 348.